

**Fair Political Practices Commission  
MEMORANDUM**

To: Chairman Johnson and Commissioners Hodson, Huguenin, Leidigh, and Remy

From: Hyla P. Wagner, Senior Commission Counsel, Legal Division  
Scott Hallabrin, General Counsel

Subject: Supplemental Memorandum on Regulation 18466 – State Ballot Measure  
Contributions and Expenditures; Online Reports

Date: August 2, 2007

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Responding to questions at the April meeting, this memorandum discusses: (1) the purpose of the Umberg bill and this regulation and what additional disclosure they capture; (2) how the Section 84204.5 reporting should apply to contributions for ballot measures made to state general purpose committees; and (3) the reporting threshold when a donor gives to a committee supporting several measures.

**1. What Disclosure Is the Section 84204.5 Reporting Meant to Capture?**

According to the Senate committee analysis, the legislation intends to close a loophole that allows ballot measure proponents to delay disclosing their financial supporters by funding a ballot measure campaign through a general purpose committee. The legislative analysis discusses the example of the Small Business Action Committee (SBAC), a state general purpose committee. In April of 2005, SBAC contributed \$555,000 to Californians for Fair Elections, a primarily formed ballot measure committee, making up over half the money raised to gather petition signatures to qualify Proposition 75. The union dues measure was on the ballot in the November 8, 2005 special election.

Under Section 85309(d) of the Act, a primarily formed ballot measure committee must file an online report within 10 days disclosing a contribution of \$5,000 received at any time other than the 90-day election cycle (when more reports are required). In the case of SBAC, although the contributions totaling \$555,000 from SBAC to Californians for Fair Elections were reported, there was no requirement that the contributors to the general purpose committee SBAC be reported early. People wondered who was funding qualification of the union dues measure. The top contributors to SBAC (including Ameriquest Capital, California Business Properties Association, New Majority PAC, Wal-Mart heir John T. Walton, and mortgage broker Robin P. Arkley II) were not disclosed until SBAC filed its semi-annual report on August 1, 2005. On August 2, 2005, the *Sacramento Bee* published an article titled, “Eight Big Donors Prop Up Prop. 75: Campaign Finance Filing Shows Business Groups Fund Move to Limit Public Employee Unions.”

Under new Section 84204.5 and Regulation 18466, when SBAC made a contribution of \$5,000 or more to support the qualification of Proposition 75 in April of 2005, it would have had to file

a report within 10 days on Form 497 showing the contribution to Californians for Fair Elections and listing SBAC's contributors since its last filed report. The entities and individuals funding the qualification drive would have been clear in April, not August, under the Section 84204.5 reporting.

## **2. How Should the Section 84204.5 Reporting Apply to State General Purpose Committees?**

Section 84204.5 is broadly drafted, stating that the reporting applies when a committee makes a contribution of \$5,000 to support or oppose the qualification or passage of a single state ballot measure. The two major types of committees that actively support or oppose state measures are *committees primarily formed* to support or oppose a state measure and *state general purpose committees*.

A "primarily formed" committee is one that exists primarily to support or oppose a single measure or group of measures being voted on in the same election, under Section 82047.5. A state general purpose committee may also support or oppose a number of state ballot measures in successive elections, under Section 82027.5. Many candidate-controlled ballot measure committees are set up as general purpose ballot measure committees because they support measures in successive elections. State ballot measure campaigns are typically run through primarily formed ballot measure committees, but may also be run through a state general purpose committee, such as California Recovery Team.

To make clear what contributions trigger the reporting, paragraphs (a)(1) and (2) of the regulation state that the reporting under Section 84204.5 applies when a donor committee makes contributions of \$5,000 or more to: a committee primarily formed to support or oppose a state ballot measure; or a state general purpose committee to support or oppose a state measure.

Everyone agrees that the reporting is triggered when a donor makes a contribution to a primarily formed committee for a state ballot measure in paragraph (a)(1). But at the April Commission meeting and in the comment letter, questions were raised about whether it is too broad to trigger Umberg reports when a donor makes contributions to a state general purpose committee in paragraph (a)(2). Because these committees may support multiple measures over successive elections, the question was raised *how will the donor know* to file a report? How will they *know* whether the general purpose committee they are giving to supports a state ballot measure?

We have responded to this concern by substantially narrowing paragraph (a)(2) from the April version. Under paragraph (a)(2)(A), reports are required when a donor makes contributions totaling \$5,000 or more to a state general purpose committee and "the donor knows the contributions are to support or oppose the qualification or passage of a single state ballot measure." This standard seems clear and fair enough. Where the donor committee knows they are supporting a state measure, such as giving in response to a verbal or written solicitation for the measure, an Umberg report is triggered. Conversely, where the donor knows that the contributions to a general purpose committee are *not* to support or oppose a state ballot measure, no Umberg report is required under paragraph (a)(2).

Under paragraph (a)(2)(B), reports are also required when a donor makes contributions totaling \$5,000 or more to a state general purpose committee which has reported contributions or expenditures exceeding \$100,000 in the past 12 months supporting or opposing the qualification or passage of a single state ballot measure and the election has not yet been held. The Umberg ballot measure reporting applies to sophisticated donors who, in most cases, will know whether a committee they are contributing large sums to supports a particular state measure. Under this standard, if the donor is not sure, they can check the committee's online reports to see if it has contributed or spent \$100,000 on a state measure coming up.

The high dollar amount of \$100,000 was selected to ensure that Regulation 18466 does not trigger Umberg reports for contributions to general purpose committees in situations that are not warranted. State ballot measure campaigns generate high contributions and expenditures. One economist documents that the average amount of advocacy spending per California state ballot measure was \$9.8 million, and the average amount of opposing spending was \$4.3 million, for total average spending per ballot measure of \$14.1 million in March 2004 real dollars.<sup>1</sup> An article examining contributions to eight state ballot measures in California's 2000 general election showed that no more than 14 contributors for any single proposition gave over \$50,000, but that this small fraction of all contributors provided the predominant share of the financing for most of the campaigns.<sup>2</sup> A 2005 article listed 44 contributors of \$100,000 and above to the California Recovery Team.<sup>3</sup>

A comment from the regulated community noted that paragraph (a)(2)(B) would be difficult to apply to committees donating to the state party committees. It might be hard for small PACs giving to the state Democratic and Republican parties to know the parties' activities and whether the funds would support a measure. The state parties are involved in many varied activities including state candidate support, party building, and measures. They frequently list measures on their election mailers resulting in in-kind contributions to the measures well above the \$100,000 threshold of subparagraph (a)(2)(B). The comment suggested that perhaps the recipient committee should be required to notify the donor when an Umberg report is required. We did not include that requirement in the regulation, but did add a provision to paragraph (a)(2)(B) stating that an Umberg report is not triggered for contributions to a general purpose committee where the donor knows the contributions are *not* to support or oppose a state ballot measure. This further narrows the instances where Umberg reports need to be filed for contributions to general purpose committees.

The attached comment letter suggested deleting paragraph (a)(2) so that the reporting requirement of Section 84204.5 would not apply to any contributions made to state general purpose committees. Eliminating paragraph (a)(2) entirely, however, would mean that if a donor committee made a large contribution to a state general purpose ballot measure committee, such as the California Recovery Team which has sponsored numerous measures in recent elections, no Section 84204.5 report showing the sources of funding would be triggered. We believe

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<sup>1</sup> Thomas Stratmann, The Effectiveness of Money in Ballot Measure Campaigns, 78 S. Cal. L. Rev. 1041, 1045 (2005).

<sup>2</sup> Kang, Michael S., Democratizing Direct Democracy, 50 UCLA L. Rev. 1141 (2003).

<sup>3</sup> Richard L. Hasen, Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns, 78 S. Cal. L. Rev. 885 (2005).

paragraph (a)(2) as revised captures ballot measure funding encompassed by the statute, without casting too wide a net.

### 3. How Does the Reporting Threshold Apply for Multiple Measure Committees?

The statute states that the reporting applies each time a committee that has online filing obligations “makes contributions totaling five thousand dollars (\$5,000) or more . . . to support or oppose the qualification or passage of *a single* state ballot measure.” (Emphasis added.) Because the statute refers to *a single state ballot measure*, we are faced with the question of how to interpret the statute for contributions to committees supporting or opposing multiple measures.

Committees supporting or opposing multiple propositions on the same ballot are common. A Secretary of State report discusses the rise in numbers of committees supporting multiple ballot measures in the 1990’s.<sup>4</sup> Examples of real multiple measure committees that were active in the 1996 primary and general elections are:

- Alliance to Revitalize California, A Committee for Propositions 200, 201 and 202 (and oppose Propositions 207 and 211)
- Citizens Against Phony Initiatives, A Project of Foundation for Taxpayer and Consumer Rights, No on Propositions 200, 201 & 202
- Consumer Attorneys Issues PAC (support Propositions 207, 210, 211 and oppose Propositions 200, 201, 202, 209 and 213)
- Taxpayers Against Frivolous Lawsuits, No on Proposition 211, A Coalition of Seniors, Small Business, Taxpayers, High Technology, and Financial Service Companies & Associates (and oppose Propositions 207, 208, 210, 212, 214, 216, 217 and support Propositions 192, 200, 201, 202, 203 and 204)

When a committee makes an independent expenditure for Measures X and Y, it is required to report the exact amount spent on X and the amount spent on Y. In contrast, when a donor makes a contribution to a committee supporting multiple measures, it is not immediately clear how the money will be spent. In the course of the campaign, the measure committee will spend the money on the propositions it cares most about, and the ones the polls show have the best chance of winning.

No one has argued that the ballot measure funding reporting should *not apply* for contributions made to a committee supporting more than one measure. This would be a major loophole in the statute and an untenable interpretation.

Paragraph (b) of the Regulation proposes that an Umberg report is required when a committee makes contributions totaling \$5,000 or more to a committee supporting or opposing multiple measures on the same ballot. The \$5,000 report threshold is only raised if before the 10-day

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<sup>4</sup> Financing California’s Statewide Ballot Measures: 1996 Primary and General Elections, available at [www.ss.ca.gov/prd/bmc96/coverbm96.htm](http://www.ss.ca.gov/prd/bmc96/coverbm96.htm).

deadline for filing the report, the donor committee has gotten a written notice from the committee receiving the contribution stating how the money will be apportioned and demonstrating that \$5,000 or more will not be spent on a single state measure.

Take the case of Consumer Attorneys Issues PAC (support Propositions 207, 210, 211 and oppose Propositions 200, 201, 202, 209 and 213). Though the PAC lists eight measures in its name, if it is focusing its spending evenly to defeat just two of the measures, and its solicitations asked donors to oppose Propositions 200 and 202, an Umberg report by a committee giving in response to that solicitation would be triggered at \$10,000. The regulation does not contemplate an automatic apportionment. If a committee that lists multiple measures in its title is just campaigning for one measure, the Umberg reports are triggered at \$5,000. If a donor committee does not obtain a written notice from a committee supporting multiple measures or if it is in doubt whether \$5,000 or more will be spent on a single measure, it should file the Section 84204.5 report at the \$5,000 threshold.

The attached comment letter expresses support for a weighted threshold automatically apportioning the contribution made among the various measures a committee supports. Thus if a donor committee gave to a committee supporting four measures, the donor would be required to report its sources of funding under Section 84204.5 when it gives \$20,000 (\$5,000 X four measures supported). In the case of a contribution to a committee like Taxpayers Against Frivolous Lawsuits which lists 14 measures, the reporting threshold would be \$70,000. The drawbacks to an automatic presumption, however, are that the funds are not likely to be apportioned equally among all the measures listed. This approach also reduces the number of Umberg reports triggered and the disclosure to the public.

Further, the Governor vetoed a previous version of the Umberg bill because it set the disclosure threshold at \$10,000. AB 1759 was vetoed in its original form (AB 938) because the Governor thought the disclosure threshold of \$10,000 in AB 938 was too high; the disclosure threshold of AB 1759 was lowered to \$5,000. The bill analysis for AB 1759 quotes the Governor's veto message for AB 938: "I support requiring a general purpose committee that makes contributions to other committees that support or oppose the qualification of a ballot measure, to disclose those contributions within 10 business days. In fact, my general purpose committee that helped qualify Propositions 74, 76, and 77 voluntarily complied with the online reporting rules found in Government Code section 85309."

The intent of Section 84204.5 is to provide the public increased disclosure of the sources of funding behind state ballot measures. It is consistent with the statutory language and intent to keep the disclosure threshold at \$5,000 for contributions to committees supporting multiple measures, except where the receiving committee documents that no more than \$5,000 will be spent on a single state measure.